Wong Fook Seng v Mrs Fredericks nee Khoo Swee Choo

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24-368 OF 1997
LOW HOP BING J
17 OCTOBER 1997

Land Law *— Restraints on dealings — Caveats — Whether caveat should be allowed to remain — Error in attestation clause to Form 19B — Whether caveat is therefore null and void — Whether essential to establish interest in land to sustain a caveat — No evidence of a concluded contract — Whether caveat ought to be removed*

The defendant is the registered owner of a piece of land ('the property'). The plaintiff alleged that the defendant had orally agreed to sell the property to him, and a draft sale and purchase agreement of the same was accepted absolutely and without qualification by the parties. However, the defendant subsequently withdrew the offer to sell the property. The plaintiff filed an action against the defendant. He also executed a Form 19B application and lodged a caveat on the property. The plaintiff subsequently applied for an order that his caveat be allowed to remain on the land until the suit is finally disposed of. Learned counsel for the defendant contended that on the facts of this case, the plaintiff has no caveatable interest, thus the caveat should be removed forthwith. Futhermore, counsel drew the attention of the court to the attestation clause to Form 19B which contains incorrectly the defendant's name as the person executing Form 19B. Counsel contended that the caveat entered as a result of the aforesaid error renders the caveat a nullity.

Held, dismissing the application with costs:

(1) Section 211 of the National Land Code 1965 regulates the attestation of instruments of dealing and provides that the attestation clause shall be that shown in Form 13B. The error in inserting the defendant's name as the person executing Form 19B was a fundamental error going to the roots of the caveat. Therefore, the plaintiff's Form 19B was null and void and consequently the caveat entered thereby was also null and void. On this ground alone, the caveat should be removed forthwith (see pp 325I and 326A–C).

(2) It is absolutely essential for the plaintiff to establish his interest in land in order to sustain a caveat. In this case, the ground for executing the caveat contained in the plaintiff's Form 19B did not allude to the execution of a concluded contract or that the parties had agreed to the sale and purchase of the property. In the absence of a concluded contract, the plaintiff had no caveatable interest. Therefore, the caveat ought to be removed (see pp 327I and 328E–F); *Murugappa Chettiar Lakshaman v Lee Teck Mook*

[1995] 1 MLJ 782 and *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 followed.

[Bahasa Malaysia summary

Defendan adalah pemilik berdaftar sebidang tanah ('harta tersebut'). Plaintif mengatakan bahawa defendan telah secara lisan bersetuju untuk menjual harta tersebut kepadanya, dan satu deraf perjanjian jual beli untuk yang berkenaan telah diterima secara mutlak dan tanpa syarat oleh parti-parti. Akan tetapi, defendan kemudiannya menarik balik tawaran untuk menjual harta tersebut. Plaintif memfailkan satu tindakan terhadap defendan. Dia juga menyempurnakan satu permohonan Borang 19B dan memasukkan satu kaveat atas harta tersebut. Plaintif kemudiannya memohon untuk satu perintah supaya kaveatnya dibenarkan untuk berterusan ke atas tanah itu sehingga guaman itu diselesaikan sepenuhnya. Peguam yang bijaksana untuk defendan menyatakan bahawa atas fakta-fakta kes, plaintif tidak mempunyai kepentingan yang boleh dikaveat, oleh itu kaveat harus dibatalkan serta merta. Tambahan pula, peguam menarik perhatian mahkamah kepada fasal pengakusaksian kepada Borang 19B yang mengandungi dengan salah nama defendan sebagai orang yang menyempurnakan Borang 19B. Peguam mengatakan bahawa kaveat yang dimasukkan disebabkan oleh kesalahan tersebut membuat kaveat itu satu pembatalan.

Diputuskan, menolak permohonan dengan kos:

(1) Seksyen 211 Kanun Tanah Negara 1965 mengawal pengakusaksian suratcara urusan dan mensyaratkan bahawa frasa pengakusaksian mesti seperti yang ditunjukkan dalam Borang 13B. Kesalahan memasukkan nama defendan sebagai orang yang menyempurnakan Borang 19B adalah satu kesalahan yang asas yang masuk ke akar kaveat itu. Oleh yang demikian, Borang 19B plaintiff adalah batal dan tak sah dan akibatnya kaveat yang dimasukkan juga adalah batal dan tak sah. Atas alasan ini sahaja, kaveat itu harus dibatalkan serta merta (lihat ms 325I dan 326A–C).

(2) Adalah sangat penting untuk plaintif membuktikan kepentingannya dalam tanah itu untuk mengekalkan satu kaveat. Dalam kes ini, alasan untuk menyempurnakan kaveat yang terkandung di dalam Borang 19B plaintif tidak menunjukkan penyempurnaan satu kontrak yang selesai atau bahawa parti-parti telah bersetuju kepada penjualan dan pembelian harta tersebut. Tanpa kontrak yang telah diselesaikan, plaintif tidak mempunyai kepentingan yang boleh dikaveat. Oleh yang demikian, kaveat itu harus dibatalkan (lihat ms 327I dan 328E–F); *Murugappa Chettiar Lakshaman v Lee Teck Mook* [1995] 1 MLJ 782 dan *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 diikut.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

Cases referred to

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Goh Paik Swan v Ng Choo Lum [1996] 3 MLJ 437 (refd)
Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189 (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315 (folld)
New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd [1996] 4 CLJ 94 (refd)
Murugappa Chettiar Lakshaman v Lee Teck Mook [1995] 1 MLJ 782 (folld)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113 (refd)
Wu Shu Chen (Sole executrix the of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (refd)

Legislation referred to

National Land Code 1965 s 323, Form 19B

SS Ravichandran (*Seah Balan Ravi & Co*) for the plaintiff.
KT Ho (*Gan Ho & Razlan Hadri*) for the defendant.

Cur Adv Vult

Low Hop Bing J:

APPLICATION

This matter before me raises an issue of critical importance to advocates and solicitors who are entrusted with the responsibility of attesting statutory forms prescribed by Parliament in the National Land Code 1965 in general or Form 19B in particular, as in the instant case. This is an application by way of originating summons in encl (1) filed by the plaintiff for an order, inter alia, that the private caveat entered by the plaintiff be allowed to remain until Civil Suit No 22–76–97 is finally determined and disposed of.

For the purpose of this judgment, any reference to a section herein is a reference to that section in the National Land Code 1965, unless the context otherwise requires.

FACTS OF THE CASE

The defendant is, at all material times, the registered owner of a piece of land held under QT(R) 1295, Lot No 14656, Mukim Klang, Negeri Selangor, together with a bungalow house erected thereon ('the property').

The plaintiff alleges that the defendant has orally agreed to sell the property to the plaintiff for a consideration of RM400,000, on the basis of which the plaintiff has instructed his solicitors to prepare a draft sale and purchase agreement ('draft SPA'). The draft SPA was sent to the defendant's solicitors who amended some clauses therein.

The plaintiff alleged that he has accepted absolutely and without qualification all the amendments proposed by the defendant.

However, on 15 July 1996 at 1539 hours, defendant's solicitors faxed a letter to the plaintiff informing the plaintiff that the defendant wishes to discuss further with her son who was due to return from overseas and that the offer to sell the property was withdrawn.

On 16 July 1996, plaintiff's solicitors informed the defendant's solicitors that a contract clearly existed between the plaintiff and the defendant for the sale of the property to the plaintiff.

On 16 September 1996, the defendant confirmed that she has no intention to sell the property at all.

On 18 November 1996, the plaintiff through his solicitors sent a notice requiring the defendant to sell the property to the plaintiff but the defendant refused to do so, whereupon the plaintiff filed Writ No 22–76–96 on 28 February 1997. The defendant filed her defence on 28 February 1997.

SUBMISSIONS FOR THE PARTIES

Since the issue for determination by the court is whether the said private caveat should be allowed to remain, learned counsel for the plaintiff contended that there is a serious question to be tried and that on a balance of convenience, the said private caveat should continue to remain.

Learned counsel for the defendant contended that on the facts of this case, the plaintiff has no caveatable interest. Further, there is also no serious question to be tried. Besides, the balance is not in favour of the continuance of the said private caveat, in which case, the caveat should not be extended but be removed forthwith.

DECISION OF THE COURT

Fundamental defect in Form 19B

Form 19B is the form prescribed under s 323 for the purpose of an application for entry of a private caveat. It is a form prescribed by Parliament in order to enable a caveator to make a solemn claim with a view to imposing a serious restraint upon the exercise by the registered proprietor

of his rights over his immovable property: per Gopal Sri Ram JCA in *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437 at p 445. That being the case, it is absolutely essential for the caveator or his learned counsel to ensure that the form is filled with particulars which reflect both correctness and accuracy. There can be no compromise in ensuring that the particulars contained in the form are both correct and accurate. Where, after a proper perusal of the form, a manifest fundamental error is found, that error may render the entry of a caveat a nullity.

In the instant case, after a careful and proper perusal of Form 19B, I find as a fact that the caveator is the plaintiff, ie Wong Fook Seng (NRIC No 4361062) who has affixed his signature on the space and the dotted line prescribed for that specific purpose, but the advocate and solicitor, one Seah Suat Tee, who attested the signature of the caveator attested as follows:

> Saya, Seah Suat Tee, seorang peguambela dan peguamcara di Mahkamah Tinggi Malaya yang bertugas di Klang dengan ini mengakui bahawa tandatangan yang di atas itu telah ditulis di hadapan saya pada 11 Oktober 1996 dan adalah tandatangan yang benar bagi *Mrs Fredericks (nee Khoo Swee Choo) No KP 320704–07–5020/2153720.* (Emphasis added.)

[Translation:

> I, Seah Suat Tee, an advocate and solicitor of the High Court of Malaya, practising in Klang hereby certify that the above signature has been written before me on 11 October 1996 and it is the signature of *Mrs Fredericks (nee Khoo Swee Choo) No KIP 320704-07-5020/2153720*).]

It was submitted for the caveator that the error was a technical error and so does not nullify the caveat, while the caveatee's learned counsel contended that the caveat entered as a result of the aforesaid error renders the caveat a nullity.

I am of the view that since Form 19B is a statutory form prescribed by Parliament, it is the bounden duty of an advocate and solicitor to ensure that correct and accurate particulars are entered. Although one does not doubt that the particulars are transcribed onto Form 19B by the supporting clerical staff of the advocate and solicitor, it is still incumbent upon a dutiful advocate and solicitor to go through the form with microscopic care and attention. An attesting advocate and solicitor cannot through his or her own carelessness or inattention impute the error to the supporting clerical staff. An attesting advocate and solicitor cannot disclaim his or her responsibility in such circumstances nor claim that the mistake is not his or her deed. Section 323(2) provides for the manner of attesting Form 19B in the following words:

> Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B *and such application shall be attested in accordance with the provisions of section 211* and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only. (Emphasis added.)

Section 211 regulates the attestation of instruments of dealing and provides in sub-s (1) that every execution by a natural person of any instrument

effecting any dealing under the National Land Code shall be attested by, eg an advocate and solicitor under the Fifth Schedule of the Code. The attestation clause shall be that shown in Form 13B, which contains a space for inserting the name of the person executing (in this case the plaintiff, as the caveator): sub-s (2). Instead of inserting the plaintiffs name, in the prescribed space in Form 13B, the defendant's name (who was not the person executing Form 19B) was inserted. This is demonstrably a fundamental error.

In the light of the fundamental error going to the roots of this caveat, I have no difficulty in holding that Form 19B is null and void and consequently the caveat entered thereby is also null and void. On this ground alone, the caveat should not be allowed to remain on the register and is hereby removed forthwith.

However, in the unlikely event that I have erred in coming to the above conclusion, I deem it necessary and advisable to consider the plaintiff's application on its merits.

The test for sustaining a caveat

In order to allow the said private caveat to remain on the register, the court must be satisfied that the plaintiff as caveator has cleared three hurdles as enunciated by the Court of Appeal. In *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437, Gopal Sri Ram JCA, held, inter alia, at p 444B–E, as follows:

> [There are] three hurdles which a caveat must surmount before it may be permitted to remain upon the register: ...
>
> '[A]n investigation into the following matters [are required]: (i) whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest; (ii) if he has established a caveatable interest, then, whether the evidence he produced ... in support of his claim to that caveatable interest discloses a serious question to be tried; and (iii) if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.'

(See also the judgments of the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, *Murugappa Chettiar Lakshaman v Lee Teck Mook* [1995] 1 MLJ 782; and *Wu Shu Chen (Sole executrix the of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 at p 503F–H).

Caveatable interest

A caveatable interest is a sine qua non for the purpose of sustaining a private caveat on the register.

In *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 (at p 115), Hashim Yeop A Sani FJ (later CJ (Malaya)) referred to *Eng*

A *Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 and held that as follows (at p 115F):

> To put it more simply, the caveator in this case must first satisfy the court that he has a 'caveatable interest' in the land. Only if he has such an interest can he qualify to lodge a caveat under s 323 of the National Land Code.

B In *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 (SC), Mohd Azmi SCJ also referred to *Eng Mee Yong & Ors v Letchumanan* and observed (at p 197E):

> Thus, for the caveat to continue in the instant case, the learned judge ought to have considered in the first instance whether as against the prima facie
C purchaser, the respondent as a third party caveator has satisfied the court that he has a caveatable claim to title or registrable interest in the land under s 323(1), before proceeding to direct his mind on the existence of serious question to be tried arising from such claim and the issue of balance of convenience.

D In *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 (SC), Jemuri Serjan CJ (Borneo) said at p 267F as follows:

> The crucial issue for our determination is whether in order to support the caveat to remain in force, the appellant has succeeded in satisfying us that it is a body at whose instance a caveat may be entered under s 323(1)(a). This seems to be the logical approach to the issue.

E From the above authorities, the principle that may be distilled in relation to the test of whether a caveat should continue to remain on the register is: whether the caveator has a caveatable interest. The application of the test will inevitably and necessarily require an investigation by the court into the facts of the case in order to determine whether the caveator has proved to
F the satisfaction of the court that he has a caveatable interest.

I now proceed to conduct an investigation into the facts of this case to determine whether the plaintiff succeeds in sustaining the said private caveat on the register.

Paragraph 1 of Form 19B reads:

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> Dengan persetujuan antara peguam saya dan peguam tuanpunya tanah secara bersurat, saya telah membeli hartanah QT(R) 1295, Lot No 14656, Mukim Klang, Daerah Klang, Selangor Darul Ehsan dengan harga belian sebanyak RM400,000 sahaja.

H [Translation:

> By the agreement between my lawyer and the landowner's lawyer via correspondence, I have bought property QT(R) 1295, Lot 14656, Mukim of Klang, District of Klang, Selangor Darul Ehsan at the purchase price of RM400,000 only.]

I The above ground contained in Form 19B did not allude to the execution of a concluded contract or that the parties have agreed to the sale and purchase of the land in question. The least that can be reasonably expected is the production by the caveator of some evidence to establish the existence

of a contract, eg payment of a consideration pursuant to an option or a sale and purchase agreement. There is no such document exhibited herein. A similar situation arose in *Muruggappa Chettiar* which led Gopal Sri Ram JCA of the Court of Appeal to hold as follows (at pp 789–790):

> Now it is clear that nowhere in the application is there an assertion of a concluded contract for the sale and purchase of the land in question. In the absence of such an assertion, it cannot be said that the respondent has a claim to the title to the land.
>
> It is axiomatic that negotiations for a contract, however advanced, do not amount to a contract. In *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 at p 763, Edgar Joseph Jr SCJ, when delivering the unanimous decision of the Supreme Court, summarized the law in words which express so well our own views on the matter that we find it unnecessary to go much further than to quote them ...
>
> Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has no interest that is capable of protection by the entry of the caveat. As we have said, the application for the entry of the caveat in the instant case contains *no assertion of a concluded contract.* (Emphasis added.)

It is absolutely essential for the plaintiff to establish his interest in land. A mere chose in action arising out of or incidental to a contract for sale of land cannot entitle the claimant to lodge a caveat willy nilly to freeze land until his action has been heard. He has to have something more, ie an interest in land: per Mahadev Shankar J (later JCA) in *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315.

In the absence of a concluded contract, as is the case before me, I hold that the plaintiff has no caveatable interest. In *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* [1996] 4 CLJ 94, I observed as follows (at p 101):

> The relevant exhs P3, P4 and P9 would indicate that only the price at RM35,000 per acre has been agreed. That alone is not sufficient. In *Clifton v Palumbo* [1994] 2 All ER 497, the court held that in transactions relating to land, the first thing to begin to think about is the price, because it is useless going further if the price is not agreed upon, and that the agreement on price forms the basis to negotiate the rest of the terms. Agreement on the price itself is insufficient. There must be agreement on other essential terms.

And at p 103, I continued:

> No deposit has yet been paid by the defendant to the plaintiff. The clear and undisputed facts of this case can lead to one and only one conclusion, ie this case is one of those cases which fall into the category of 'subject to contract' cases.

Conclusion

On the foregoing grounds, cadit quaestio. I hold that the caveator has failed to satisfy the first hurdle in that the material set out by him in his application under s 323(1)(a) has not disclosed a caveatable interest and his application is dismissed with costs.

A The caveator, ie the plaintiff is also ordered to pay damages to the defendant, such damages to assessed by the senior assistant registrar.

Appeal dismissed with costs.

Reported by Loo Lai Mee

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